

ORIGINAL

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6

Attorneys for Defendant  
7 BANK OF AMERICA, NATIONAL ASSOCIATION

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 WILLIAM MARR,

12 Plaintiff,

13 v.

14 BANK OF AMERICA, NATIONAL  
15 ASSOCIATION and DOES 1 through 100,  
inclusive,

16 Defendant.  
17

Case No. 09 5978

NOTICE OF REMOVAL BY  
DEFENDANT BANK OF AMERICA,  
NATIONAL ASSOCIATION

FILED

DEC 21 2009

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

E-filing

B7

1 To the Clerk of Court, Plaintiff William Marr, and his attorneys of record:

2 PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. sections 1441 *et seq.*, defendant  
3 Bank of America, National Association (“Defendant”) hereby removes this action from the  
4 Superior Court of California for the County of San Francisco to the United States District Court  
5 for the Northern District of California, based on the following facts:

6  
7 **I. PROCEEDINGS TO DATE**

8 1. On August 20, 2009, a civil action was commenced in the Superior Court of  
9 California for the County of San Francisco entitled “William Marr, Plaintiff, vs. Bank of America  
10 National Association; and Does 1 through 100 inclusive, Defendants,” No. CGC-09-491675 (the  
11 “Action”). Plaintiff filed a first amended complaint on October 23, 2009 (“First Amended  
12 Complaint”). A true and correct copy of the Summons, complaint, First Amended Complaint,  
13 Civil Case Cover Sheet, and other papers issued with the First Amended Complaint are attached  
14 to this notice as Exhibit A. The allegations of the First Amended Complaint in the Action are  
15 incorporated by reference in this notice without necessarily admitting any of them.

16 2. November 20, 2008 was the first date upon which Defendant was served  
17 with a copy of the Summons and First Amended Complaint. Attached hereto as Exhibit B is a  
18 true and correct copy of the Notice of Acknowledgment of Receipt-Civil that was signed by  
19 Cindy M. Walker on November 20, 2009 and delivered to Plaintiff’s counsel on the same date.  
20 Therefore, this notice is timely as it is filed within thirty (30) days of the first receipt by a  
21 defendant of a copy of the Summons and Complaint in this matter. 28 U.S.C. § 1446(b). Except  
22 as described herein, Defendant has not been served with any pleadings in this Action.

23 4. Defendants are informed and believe and on that basis allege that there have been  
24 no other named defendants in this case and that no other defendant, whether named or not, has  
25 been served with or otherwise received the First Amended Complaint in the Action.

26 5. On December 21, 2009 Defendant filed its Answer to Plaintiff’s First Amended  
27 Complaint in the Superior Court of California County of San Francisco, a true and correct copy of  
28 which is attached to this notice as Exhibit C.

## II. JURISDICTION/GROUNDS FOR REMOVAL

6. Defendant removes the Action to this Court on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1144(a).

A. This Court has federal question jurisdiction over the Action based on the following facts.

(i) In his First Amended Complaint, Plaintiff claims deprivation of Long Term Disability benefits. (First Amended Complaint ¶¶ 19, 20, 36, 44, 46, 53, 55, and 61.) The Long Term Disability benefits on which Plaintiff's claim are based, are available to eligible employees pursuant to Defendant's Long Term Disability Plan ("the Plan"). The Plan is an employee welfare benefit plan subject to the provisions of ERISA, 29 U.S.C. Sections 1001, *et seq.*

(ii) This Action is subject to removal pursuant to 28 U.S.C. § 1441(b), in that it arises under a federal law because it requires a court to interpret the provisions of an employee benefit plan subject to ERISA and seeks to recover benefits allegedly due under the Plan. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (holding that state law claims that seek benefits available under an ERISA plan are recharacterized as ERISA claims, are completely preempted under ERISA § 502(a), 29 U.S.C. § 1132(a), and are therefore removable to federal court, 29 U.S.C. § 1132(f)). Thus, this Court has jurisdiction pursuant to 29 U.S.C. § 1144(a) and 28 U.S.C. § 1331. *Id.* See also *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 957 (9th Cir. 1998) (noting that where the existence or calculation of ERISA benefits are in dispute, ERISA preempts state law claims); *In re: Marriage of Nasca v. Peoplesoft*, 1999 WL 64947 (N.D. Cal. 1999) (noting courts have found complete ERISA preemption where the quality, nature or existence of ERISA benefits is at issue); *Farr v. U.S. West, Inc.*, 58 F.3d 1361, 1365-66 (9th Cir. 1995) (noting that ERISA preemption applies where the precise damages and benefits plaintiff claims depend on employee benefit plan); *AT & T Communications, Inc. v. Superior Court*, 21 Cal. App. 4th 1673, 1678, 1683 (1994) (ERISA preempts because rights of the parties cannot be determined without examining plan); see also *General American Life Ins. Co. v.*

1 *Castonguay*, 984 F.2d 1518, 1521 (9th Cir. 1993) (key to preemption inquiry is “recognizing that  
2 the statute comprehensively regulates certain relationships” such as employer and employee).

3 (iii) Plaintiff alleges that he was deprived of and is entitled to Long  
4 Term Disability benefits under the Plan. Because Plaintiff’s allegations require the Court to  
5 interpret the Plan to determine whether Plaintiff was entitled to Long Term Disability benefits as  
6 Plaintiff claims and in the amount that Plaintiff claims, the claims are preempted by ERISA.  
7 State law claims relating to employee benefit plans are preempted. *Geweke Ford v. St. Joseph’s*  
8 *Omni Pref. Care Inc.*, 130 F.3d 1355, 1358 (9th Cir. 1997) (state contract law that reaches a  
9 relationship regulated by ERISA is preempted); *Sorosky v. Burroughs*, 826 F.2d 794, 800 (9th  
10 Cir. 1987) (breach of contract claim preempted); *Davidian v. Southern California Meat Cutters*  
11 *Union*, 859 F.2d 134, 135 (9th Cir. 1989) (fraud claim preempted); *Scott v. Gulf Oil Corp.*, 754  
12 F.2d 1499, 1505 (9th Cir. 1985) (ERISA preempts fraud claim relating to loss of benefits and  
13 contract claim alleging denial of benefits due); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356  
14 (9th Cir. 1984) (fraud and breach of contract claims preempted); *Johnson v. District 2 Marine*  
15 *Engineers Beneficial Ass’n*, 857 F.2d 514, 517-18 (9th Cir. 1988) (ERISA generally preempts  
16 claims for intentional infliction of emotional distress); *see also, Stiltner v. Berretta, U.S.A. Corp.*,  
17 1996 WL 42225 (4th Cir. 1996) (citing cases holding that ERISA preempts intentional infliction  
18 claims).

19 (iv) Thus, this is a civil action of which the district courts have original  
20 jurisdiction on a claim arising under the laws of the United States which is removable without  
21 regard to the citizenship or residence of the parties.

22 (v) To the extent any claim survives ERISA pre-emption, such claim is  
23 within this Court’s supplemental jurisdiction. *See* 28 U.S.C. § 1367.

24 7. Because this Action is currently pending before the Superior Court of California  
25 for the County of San Francisco, this District is the proper venue for this Action upon removal.  
26 *See* 28 U.S.C. § 1441(a).

27 ///

28 ///

1 8. This Court therefore has original jurisdiction over this action pursuant to 28 U.S.C. §§  
2 1331 and 1367, 29 U.S.C. § 1144, and this action may be removed to this Court pursuant to 28  
3 U.S.C. § 1441.

4 Dated: December 21, 2009

PATRICIA K. GILLETTE  
AMIRA B. DAY  
Orrick, Herrington & Sutcliffe LLP

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7  
8 PATRICIA K. GILLETTE  
AMIRA B. DAY  
Attorneys for Defendant  
BANK OF AMERICA, NATIONAL  
ASSOCIATION  
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**PROOF OF SERVICE BY MAIL**

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On December 21, 2009, I served the following document(s):

- **CIVIL CASE COVER SHEET**
- **NOTICE OF REMOVAL BY DEFENDANT BANK OF AMERICA, NATIONAL ASSOCIATION**
- **DEFENDANT BANK OF AMERICA, NATIONAL ASSOCIATION'S CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

**David J. Becht, Esq.**  
**Michael Sachs, Esq.**  
**Adams, Nye, Trapani, Becht LLP**  
**222 Kearny Street, 7<sup>th</sup> Floor**  
**San Francisco, CA 94108-4521**

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2009, at San Francisco, California.



Erica S. Andrada







**Service of Process  
Transmittal**

11/05/2009

CT Log Number 515678418



**TO:** Andrew Bott  
Bank of America  
CA5-705-08-01, 555 California Street, 8th Floor  
San Francisco, CA 94104

**RE:** **Process Served In California**

**FOR:** Bank of America, National Association (Domestic State: N/A)

**ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:**

**TITLE OF ACTION:** William Marr, Pltff. vs. Bank of America National Association, et al., Dfts.  
*Name discrepancy noted.*

**DOCUMENT(S) SERVED:** Letter, Summons, Cover Sheet, Complaint, Copy of First Amended Complaint, Notice(s), Attachment(s), Stipulation Form, Statement Form, Self Addressed Stamped Envelope, Notice and Acknowledgment of Receipt (2 sets)

**COURT/AGENCY:** San Francisco County, Superior Court, CA  
Case # CGC09491675

**NATURE OF ACTION:** Employee Litigation - Failure to reimburse employee for business expense - Unlawful Wage Deductions

**ON WHOM PROCESS WAS SERVED:** C T Corporation System, Los Angeles, CA

**DATE AND HOUR OF SERVICE:** By Regular Mail on 11/05/2009 postmarked on 10/26/2009

**APPEARANCE OR ANSWER DUE:** Within 20 days from date of mailing dated 10/26/09 - Complete acknowledgment form and return // Within 30 days after service - file an answer // 01/22/2010 at 9:00 a.m - Case management conference

**ATTORNEY(S) / SENDER(S):** Michael Sachs  
Adams Nye Trapani Becht LLP  
222 Kearny Street  
Seventh Floor  
San Francisco, CA 94108-4521  
415-982-8955

**REMARKS:** Service was made by mail under Section 415.30 of the California Code of Civil Procedure. Enclosed is a Notice and Acknowledgment of Receipt of Summons and Complaint for your consideration. Please be aware that C T Corporation does not sign on behalf of your company.

**ACTION ITEMS:** SOP Papers with Transmittal, via Fed Ex Standard Overnight , 790193441557  
Image SOP  
Email Notification, Andrew Bott andrew.m.bott@bankofamerica.com

**SIGNED:** C T Corporation System  
**PER:** Nancy Flores  
**ADDRESS:** 818 West Seventh Street  
Los Angeles, CA 90017  
**TELEPHONE:** 213-337-4615

**LEGAL DEPARTMENT  
RECEIVED**

NOV 06 2009

**SAN FRANCISCO,  
BANK OF AMERICA, N.A.**

Page 1 of 1 (N/A)

Information displayed on this transmittal is for the Bank of America's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.



adams | nye | trapani | becht | LLP  
ATTORNEYS AT LAW

E-Mail Address: msachs@adamsnye.com  
mearle@adamsnye.com

October 26, 2009

C T Corporation System  
Agent For Service of Process:  
**Bank of America National Association**  
818 West Seventh Street  
Los Angeles, CA 90017

Re: **William Marr v. Bank of America National Association**  
**Superior Court of the State of California**  
**In and For the County of San Francisco**  
**Case Number: CGC-09-491675**  
**Our File Number: ROG-00177**

Dear Sir or Madam:

Enclosed please find the following documents:

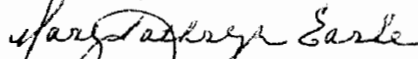
1. Summons, issued by the Court on August 20, 2009;
2. Civil Case Cover Sheet, endorsed-filed on August 20, 2009
3. Complaint For Damages, Injunctive Relief and Demand For Jury Trial, endorsed-filed on August 20, 2009;
4. First Amended Complaint For Damages, Injunctive Relief and Demand For Jury Trial, endorsed-filed on October 23, 2009;
5. Notice of Related Case, endorsed-filed on August 20, 2009;
6. Alternative Dispute Resolution (ADR) Program Information Package;
7. Stipulation to Alternative Dispute Resolution;
8. Superior Court of California – County of San Francisco – Judicial Mediation Program Information;
9. Notice To Plaintiff reflecting that a Case Management Conference is scheduled for **January 22, 2010, at 9:00 a.m., in Department 212, Superior Court of California, County of San Francisco, 400 McAllister Street, San Francisco, CA 94102-3680**
10. Notice And Acknowledgment Of Receipt – Civil - with accompanying self-addressed, stamped envelope.

C T Corporation System  
Re: William Marr v. Bank of America National Association  
October 26, 2009  
Page 2

Please do not hesitate to contact Michael Sachs – of this office – should you have any questions ((415) 982-8955) (msachs@adamsnye.com).

Thank you for your time and attention, regarding the above.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Mary Kathryn Earle".

Mary Kathryn Earle

Secretary to:

Michael Sachs

MS/mke  
Enclosures

# SUMMONS (CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):

*Bank of America National Association  
d/b/a Thrift 100, in civil*

YOU ARE BEING SUED BY PLAINTIFF:  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

*William Man*

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:  
(El nombre y dirección de la corte es):

SUPERIOR COURT OF CALIFORNIA  
400 MCALLISTER STREET  
SAME  
SAN FRANCISCO, CA 94102

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

DAVID J. BECHT, ESQ., S.B.N. 104208

(415) 982-8955 (415) 982-2042

MICHAEL SACHS, ESQ., S.B.N. 235048

ADAMS | NYE | TRAPANI | BECHT LLP

SAN FRANCISCO, CA 94108-4521

DATE: **AUG 20 2009**

(Fecha)

Clerk, by

(Secretario)

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.

2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): *Bank of America National Association*

under: ☒ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☒ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):

Page 1 of 1

SUMMONS

Legal  
Solutions

Code of Civil Procedure §§ 412.20, 405

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): MICHAEL SACHS, ESQ., S.B.N. 235048 DAVID J. BECHT, SBN 104208 ADAMS   NYE   TRAPANI   BECHT LLP 222 KEARNY STREET - SEVENTH FLOOR SAN FRANCISCO, CA 94108-4521 TELEPHONE NO.: (415) 982-8955 FAX NO.: (415) 982-2042 ATTORNEY FOR (Name): Plaintiff, WILLIAM MARR		FOR COURT USE ONLY  ENCLOSED FILED San Francisco County Superior Court AUG 20 2009 GORDON PARKER, Li. Clerk BY: CHRISTINE BAUTISTA Deputy Clerk CASE NUMBER: 09-491675 DEPT:
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO STREET ADDRESS: 400 McALLISTER STREET MAILING ADDRESS: SAME CITY AND ZIP CODE: SAN FRANCISCO, CA 94102 BRANCH NAME:		
CASE NAME: WILLIAM MARR v. BANK OF AMERICA NATIONAL ASSOCIATION, ET AL.		
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less) <input type="checkbox"/> Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) <b>Non-PI/PD/WD (Other) Tort</b> <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input checked="" type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <b>Real Property</b> <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <b>Judicial Review</b> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)</b> <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive

4. Number of causes of action (specify): Four

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)  
 Date: August 14, 2009  
 MICHAEL SACHS, ESQ., S.B.N. 235048  
 (TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

## NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2



## INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

CM-010

**To Plaintiffs and Others Filing First Papers.** If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

**To Parties in Rule 3.740 Collections Cases.** A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

**To Parties in Complex Cases.** In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

## CASE TYPES AND EXAMPLES

## Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death  
Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

## Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)  
Asbestos Property Damage  
Asbestos Personal Injury/Wrongful Death  
Product Liability (*not asbestos or toxic/environmental*) (24)  
Medical Malpractice (45)  
Medical Malpractice—Physicians & Surgeons  
Other Professional Health Care Malpractice  
Other PI/PD/WD (23)  
Premises Liability (e.g., slip and fall)  
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)  
Intentional Infliction of Emotional Distress  
Negligent Infliction of Emotional Distress  
Other PI/PD/WD

## Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)  
Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)  
Defamation (e.g., slander, libel) (13)  
Fraud (16)  
Intellectual Property (19)  
Professional Negligence (25)  
Legal Malpractice  
Other Professional Malpractice (*not medical or legal*)  
Other Non-PI/PD/WD Tort (35)  
Employment  
Wrongful Termination (36)  
Other Employment (15)

## Contract

Breach of Contract/Warranty (06)  
Breach of Rental/Lease  
Contract (*not unlawful detainer or wrongful eviction*)  
Contract/Warranty Breach—Seller Plaintiff (*not fraud or negligence*)  
Negligent Breach of Contract/Warranty  
Other Breach of Contract/Warranty  
Collections (e.g., money owed, open book accounts) (09)  
Collection Case—Seller Plaintiff  
Other Promissory Note/Collections Case  
Insurance Coverage (*not provisionally complex*) (18)  
Auto Subrogation  
Other Coverage  
Other Contract (37)  
Contractual Fraud  
Other Contract Dispute

## Real Property

Eminent Domain/Inverse Condemnation (14)  
Wrongful Eviction (33)  
Other Real Property (e.g., quiet title) (26)  
Writ of Possession of Real Property  
Mortgage Foreclosure  
Quiet Title  
Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

## Unlawful Detainer

Commercial (31)  
Residential (32)  
Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

## Judicial Review

Asset Forfeiture (05)  
Petition Re: Arbitration Award (11)  
Writ of Mandate (02)  
Writ—Administrative Mandamus  
Writ—Mandamus on Limited Court Case Matter  
Writ—Other Limited Court Case Review  
Other Judicial Review (39)  
Review of Health Officer Order  
Notice of Appeal—Labor  
Commissioner Appeals

## Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)  
Construction Defect (10)  
Claims Involving Mass Tort (40)  
Securities Litigation (28)  
Environmental/Toxic Tort (30)  
Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)

## Enforcement of Judgment

Enforcement of Judgment (20)  
Abstract of Judgment (Out of County)  
Confession of Judgment (*non-domestic relations*)  
Sister State Judgment  
Administrative Agency Award (*not unpaid taxes*)  
Petition/Certification of Entry of Judgment on Unpaid Taxes  
Other Enforcement of Judgment Case

## Miscellaneous Civil Complaint

RICO (27)  
Other Complaint (*not specified above*) (42)  
Declaratory Relief Only  
Injunctive Relief Only (*non-harassment*)  
Mechanics Lien  
Other Commercial Complaint Case (*non-tort/non-complex*)  
Other Civil Complaint (*non-tort/non-complex*)

## Miscellaneous Civil Petition

Partnership and Corporate Governance (21)  
Other Petition (*not specified above*) (43)  
Civil Harassment  
Workplace Violence  
Elder/Dependent Adult Abuse  
Election Contest  
Petition for Name Change  
Petition for Relief from Late Claim  
Other Civil Petition

#3

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FILED  
 San Francisco County Superior Court

AUG 20 2009

GORDON PARK-LI, Clerk  
 BY: CRISTINA E. BAUTISTA  
 Deputy Clerk

Attorneys for Plaintiff  
 WILLIAM MARR

CASE MANAGEMENT CONFERENCE SET

JAN 22 2010 - 9:00 AM

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 DEPARTMENT 212  
 COUNTY OF SAN FRANCISCO

WILLIAM MARR,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL  
 ASSOCIATION; and DOES 1 through 100,  
 inclusive,

Defendants.

No. CGC-09-491675

COMPLAINT FOR DAMAGES,  
 INJUNCTIVE RELIEF AND DEMAND  
 FOR JURY TRIAL

THE PARTIES

1. At all relevant times herein mentioned, Plaintiff WILLIAM MARR ("Mr. MARR") was an individual residing in the State of California. The employment upon which he sues herein was performed in the State of California, including the County of San Francisco.

2. At all relevant times herein mentioned, Defendant BANK OF AMERICA NATIONAL ASSOCIATION ("BANK OF AMERICA") was and is a corporation doing business in the State of California, including the County of San Francisco.

3. Mr. MARR is ignorant of the true names and capacities, whether corporate, associate, or otherwise, of the Defendants sued herein as Does 1 through 100, inclusive and therefore sues these Defendants by such fictitious names. These fictitiously named Defendants intentionally, negligently,

1 or otherwise performed each of the acts and omissions alleged herein, and Mr. MARR's injuries and  
 2 damages were proximately and legally caused by such acts and omissions. Mr. MARR prays leave to  
 3 insert with appropriate allegations their true names and capacities when ascertained.

4 4. Mr. MARR is informed and believes and thereon alleges that each Defendant named in  
 5 this action, including the Doe Defendants, at all relevant times were the agents, ostensible agents,  
 6 servants, employees, representatives, assistants and/or co-conspirators of each of the other Defendants  
 7 and were at all times acting at least in part within the course and scope of his, her, or its authority as  
 8 agents, ostensible agents, servants, employees, representatives and/or associates, with the  
 9 authorization, consent, permission or ratification of each of the other Defendants.

#### 10 GENERAL AND BACKGROUND ALLEGATIONS

11 5. The acts and omissions of Defendants BANK OF AMERICA and Does 1-100 occurred  
 12 throughout the State of California, including in the County of San Francisco.

13 6. Mr. MARR is employed by BANK OF AMERICA as an Account Executive ("AE").  
 14 Mr. MARR began work as an Account Executive in July 2001.

15 7. In his capacity as an AE, Mr. MARR was and is required to drive to and from various  
 16 locations in his own car to meet with clients; prepare, print and purchase promotional materials;  
 17 purchase computer programs and other materials for use in his office; purchase meals, food, beverage  
 18 and other gifts for BANK OF AMERICA's clients and potential clients; make cellular phone calls;  
 19 make long distance phone calls; generally maintain an office inside his home for the conduct of  
 20 activities related to his job duties and responsibilities as Defendant BANK OF AMERICA's  
 21 employee.

22 8. BANK OF AMERICA has made and continues to make several "adjustments" or  
 23 charges to Mr. MARR's compensation. BANK OF AMERICA charges Mr. MARR for the services  
 24 of an Account Executive Assistant ("AEA") who was also a BANK OF AMERICA employee. The  
 25 AEA's compensation is paid by Mr. MARR through these adjustments.

26 9. When Mr. MARR finalizes a mortgage on behalf of BANK OF AMERICA, and there  
 27 are additional charges, closing costs, processing fees, extension fees and other costs and fees, and the  
 28 consumer does not wish to pay these charges, BANK OF AMERICA charges Mr. MARR.



1           10.     BANK OF AMERICA policy states that AE's should be given a cash bonus for every  
2 referral. Mr. MARR has had over 40 referrals during his employment and has never been provided  
3 with any bonus for these referrals.

4           11.     BANK OF AMERICA has the sole right to set the mortgage interest rate it offers to  
5 customers. This rates differ based on which BANK OF AMERICA employee is offering the rate, the  
6 customer that is requesting a mortgage and where the property to be covered by the mortgage is  
7 located.

8           12.     If Mr. MARR needs to provide a lower rate than the mortgage interest rate set by  
9 BANK OF AMERICA to guarantee that a consumer enters into the loan, BANK OF AMERICA  
10 charges him the amount necessary to lower the interest rate to the amount the customer requests. This  
11 charge is called an underage. When there is a problem in locking-in a rate for a consumer, Mr.  
12 MARR is charged by BANK OF AMERICA for the difference between the lock-in rate and the actual  
13 interest rate. Any problem in the loan structure results in Mr. MARR being charged by BANK OF  
14 AMERICA. This charge is called a curtailment.

15           13.     BANK OF AMERICA has not acted in good faith in setting the mortgage interest rate  
16 for AEs. The vast majority of mortgages sold by Mr. MARR in particular, and the AEs in general,  
17 require the use of an underage. The use of this underage deprives Mr. MARR of commissions he  
18 would have received but for BANK OF AMERICA's policy of initially inflating the mortgage interest  
19 rate offered by AEs.

20           14.     While Mr. MARR has incurred and continues to incur tremendous expenses as a result  
21 of his employment, BANK OF AMERICA refuses to reimburse him for these expenses.

22                   **FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
23                   (Failure to Reimburse Employee for Business Expenses)  
24                   (California Labor Code §2802)

25           15.     Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 13  
26 above.

27           16.     California Labor Code §2802 provides that employers shall reimburse employees for  
28 all expenses incurred in the performance of their duties.

1           17.     BANK OF AMERICA required Mr. MARR to travel to various residences and  
2 businesses throughout the State of California and other states, for purposes of selling mortgages.

3           18.     In the ordinary course of his employment and in the process of this travel, Mr. MARR  
4 regularly incurred expenses, including but not limited to: millage; costs for promotional materials; the  
5 salary of his assistant, a BANK OF AMERICA employee; cellular phone charges; enticements  
6 provided to potential customers or actual customers to complete a sale; office expenses including the  
7 purchase of computer software and office supplies; long distance phone charges, meal charges and  
8 other business related expenses incurred in the course of his employment.

9           19.     BANK OF AMERICA intentionally and consistently failed to reimburse Mr. MARR  
10 for expenses incurred in the performance of his duties, in violation of California Labor Code §2802.

11           20.     Mr. MARR is entitled to the full amount of expenses he incurred, plus interest, and  
12 reasonable attorneys' fees and costs of suit as proscribed by California Labor Code §2802.

13           WHEREFORE, Mr. MARR requests relief as hereinafter provided.

14                   **SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS**

15                               (Unlawful Wage Deductions)  
16                               (Violation of California Labor Code §221)

17           21.     Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 22  
18 above.

19           22.     California Labor Code §221 provides that an employer may not "collect or receive  
20 from an employee any part of wages paid by said employer to said employee."

21           23.     DEFENDANTS intentionally and consistently charged Mr. MARR for expenses  
22 incurred in the performance of his duties including, but not limited to, the salary of his assistant a  
23 BANK OF AMERICA EMPLOYEE; closing costs; loan processing fees; extension fees; underage  
24 charges (deductions for mortgages under the prevailing rate); uncollected/waived fee charges;  
25 misquote and rate lock failure charges; and curtailment charges, in violation of California Labor Code  
26 §221.

27           ///

28           ///

          ///

1           24.     Mr. MARR is entitled to recover the full amount of deducted wages, plus interest, and  
2 reasonable attorneys' fees and costs of suit as proscribed by California Labor Code §218.5.

3           WHEREFORE, Mr. MARR requests relief as hereinafter provided.

4                   **THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
5                   (Breach of the Covenant of Good Faith and Fair Dealing)

6           25.     Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 26  
7 above.

8           26.     Mr. MARR's contract with BANK OF AMERICA as embodied, *inter alia*, in the  
9 Retail Sales Compensation Plan, contained an implied-in-law covenant of good faith and fair dealing  
10 that neither party would do anything to injure the right of the other party to enjoy the actual benefits of  
11 that contract.

12          27.     Mr. MARR's contract with BANK OF AMERICA provided for Mr. MARR to receive  
13 commissions based upon the mortgage rate set exclusively by BANK OF AMERICA in its unfettered  
14 discretion. When mortgages were sold at a rate lower than that set by BANK OF AMERICA, with  
15 express approval of BANK OF AMERICA, Mr. MARR received a lower commission than for a  
16 mortgage sold at or above the rate set by BANK OF AMERICA.

17          28.     BANK OF AMERICA had an obligation to set the mortgage rate in good faith.

18          29.     BANK OF AMERICA did not exercise its discretion in good faith, but instead set the  
19 mortgage rate an elevated level in order to deprive Mr. MARR of commissions based upon mortgages  
20 he sold.

21          30.     Mr. MARR has performed all the covenants, conditions and obligations that were  
22 under his control as part of the contract.

23          31.     As a direct and proximate result of DEFENDANTS' breach of the covenant of good  
24 faith and fair dealing, Mr. MARR has suffered damages.

25          WHEREFORE, Mr. MARR requests relief as hereinafter provided.

26          ///

27          ///

28          ///

**FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
(Violation of Business and Professions Code §17200, *et seq.*)

32. Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 33 above.

33. BANK OF AMERICA is a "person" as that term is defined under California Business and Professions Code §17201.

34. California Business and Professions Code §17200 defines unfair competition as any unlawful, unfair, or fraudulent business act or practice.

35. At all times relevant hereto, by and through the conduct described herein, BANK OF AMERICA has engaged in unfair and unlawful practices by requiring Mr. MARR adhere to a contract of adhesion; failing to reimburse Mr. MARR for business expenses incurred while in BANK OF AMERICA's employ, in violation of California Labor Code §2802; making unlawful deductions from Mr. MARR's wages in violation of California Labor Code §221; and failing to act in good faith, all in violation of California Business and Professions Code §17200 *et seq.*, which has thereby deprived Mr. MARR of money and property.

36. By and through the unfair and unlawful business practices described herein, BANK OF AMERICA has obtained valuable property, money, and services from Mr. MARR and has deprived him of valuable rights and benefits guaranteed by law, all to his detriment.

37. All the acts described herein as violation of, among other things, California Labor Code §§221 and 2802, contract of adhesion law and the covenant of good faith and fair dealing, are unlawful and in violation of public policy; and in addition are immoral, unethical, oppressive and unscrupulous, and thereby constitute unfair and unlawful business practices in violation of California Business and Professions Code §17200 *et seq.*

38. Mr. MARR is entitled to, and does, seek such relief as may be necessary to restore to him the money and property which BANK OF AMERICA has acquired, or of which Mr. MARR has been deprived, by means of the above described unfair and unlawful business practices.

39. Mr. MARR is further entitled to, and does, seek a declaration that the above described business practices are unfair and unlawful and that an injunctive relief should be issued restraining



1 BANK OF AMERICA from engaging in any of the above described unfair and unlawful business  
2 practices in the future.

3 40. Mr. MARR is further entitled to, and does, seek an award of attorneys' fees, costs and  
4 expenses incurred in the investigation, filing and prosecution of this action pursuant to California  
5 Code of Civil Procedure §1021.5, California Business and Professions Code §17200, et seq., Labor  
6 Code §§218.5 and 2802, and any other applicable provision of law.

7 41. Mr. MARR has no plain, speedy, and/or adequate remedy at law to redress the injuries  
8 which he has suffered as a consequence of the unfair and unlawful business practices of BANK OF  
9 AMERICA. As a result of the unfair and unlawful business practices described above, Mr. MARR  
10 suffered and will continue to suffer irreparable harm unless BANK OF AMERICA is restrained from  
11 continuing to engage in these unfair and unlawful business practices. In addition, BANK OF  
12 AMERICA should be required to disgorge the unpaid moneys to Mr. MARR.

13 WHEREFORE, Mr. MARR requests relief as hereinafter provided.

#### 14 JURY DEMAND

15 Mr. MARR demands a jury to all issues joined herein.

#### 16 PRAYER FOR RELIEF

17 WHEREFORE, Mr. MARR requests relief as follows:

- 18 1. For general damages according to proof;
- 19 2. For special damages according to proof;
- 20 3. For costs of suit;
- 21 4. For reasonable attorneys fees (For the First, Second and Fourth Causes of Action);
- 22 5. For interest at the maximum legal rate on all sums awarded;
- 23 6. For an order preliminarily and permanently enjoining BANK OF AMERICA from  
24 engaging in the practices challenged herein (as to the Fourth Cause of Action);

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26 ///

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1           7.       For an order for full restitution of all monies, as necessary and according to proof, to  
2 restore any and all monies withheld, acquired, and/or converted by BANK OF AMERICA by means  
3 of the unfair practices complained of herein (as to the Fourth Cause of Action); and

4           8.       For such other relief as the Court deems just and proper.  
5

6 DATED: August 14, 2009

ADAMS | NYE | TRAPANI | BECHT LLP

7  
8 By: 

9                   DAVID J. BECHT  
10                   MICHAEL SACHS  
11                   MYTHILY SIVARAJAH  
12                   Attorneys for Plaintiff  
13                   WILLIAM MARR  
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 2 MICHAEL SACHS, SBN 235048  
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9 Attorneys for Plaintiff  
 10 WILLIAM MARR

ENDORSED  
 FILED  
 Superior Court of California  
 County of San Francisco

OCT 23 2009

GORDON PARK-LI, Clerk  
 BY: ROSSALY DE LA VEGA NAVARRO  
 Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF SAN FRANCISCO

13 WILLIAM MARR,

14 Plaintiff,

15 vs.

16 BANK OF AMERICA NATIONAL  
 17 ASSOCIATION; and DOES 1 through 100,  
 18 inclusive,

19 Defendants.

No. CGC 09 491675

FIRST AMENDED COMPLAINT FOR  
 DAMAGES, INJUNCTIVE RELIEF  
 AND DEMAND FOR JURY TRIAL

BY FAX

20 THE PARTIES

21 1. At all relevant times herein mentioned, Plaintiff WILLIAM MARR ("Mr. MARR")  
 22 was an individual residing in the State of California. The employment upon which he sues herein was  
 23 performed in the State of California, including the County of San Francisco.

24 2. At all relevant times herein mentioned, Defendant BANK OF AMERICA NATIONAL  
 25 ASSOCIATION ("BANK OF AMERICA") was and is a corporation doing business in the State of  
 26 California, including the County of San Francisco.

27 3. Mr. MARR is ignorant of the true names and capacities, whether corporate, associate,  
 28 or otherwise, of the Defendants sued herein as Does 1 through 100, inclusive and therefore sues these  
 Defendants by such fictitious names. These fictitiously named Defendants intentionally, negligently,  
 or otherwise performed each of the acts and omissions alleged herein, and Mr. MARR's injuries and



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9 Attorneys for Plaintiff  
10 WILLIAM MARR

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

11 WILLIAM MARR,

12 Plaintiff,

13 vs.

14 BANK OF AMERICA NATIONAL  
15 ASSOCIATION; and DOES 1 through 100,  
16 inclusive,

17 Defendants.

No. CGC 09 491675

**FIRST AMENDED COMPLAINT FOR  
DAMAGES, INJUNCTIVE RELIEF  
AND DEMAND FOR JURY TRIAL**

18  
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28  
THE PARTIES

1. At all relevant times herein mentioned, Plaintiff WILLIAM MARR ("Mr. MARR") was an individual residing in the State of California. The employment upon which he sues herein was performed in the State of California, including the County of San Francisco.

2. At all relevant times herein mentioned, Defendant BANK OF AMERICA NATIONAL ASSOCIATION ("BANK OF AMERICA") was and is a corporation doing business in the State of California, including the County of San Francisco.

3. Mr. MARR is ignorant of the true names and capacities, whether corporate, associate, or otherwise, of the Defendants sued herein as Does 1 through 100, inclusive and therefore sues these Defendants by such fictitious names. These fictitiously named Defendants intentionally, negligently, or otherwise performed each of the acts and omissions alleged herein, and Mr. MARR's injuries and

1 damages were proximately and legally caused by such acts and omissions. Mr. MARR prays leave to  
2 insert with appropriate allegations their true names and capacities when ascertained.

3 4. Mr. MARR is informed and believes and thereon alleges that each Defendant named in  
4 this action, including the Doe Defendants, at all relevant times were the agents, ostensible agents,  
5 servants, employees, representatives, assistants and/or co-conspirators of each of the other Defendants  
6 and were at all times acting at least in part within the course and scope of his, her, or its authority as  
7 agents, ostensible agents, servants, employees, representatives and/or associates, with the  
8 authorization, consent, permission or ratification of each of the other Defendants.

9 **GENERAL AND BACKGROUND ALLEGATIONS**

10 5. The acts and omissions of Defendants BANK OF AMERICA and Does 1-100 occurred  
11 throughout the State of California, including in the County of San Francisco.

12 6. Mr. MARR is employed by BANK OF AMERICA as an Account Executive ("AE").  
13 Mr. MARR began work as an Account Executive in July 2001.

14 7. In his capacity as an AE, Mr. MARR was and is required to drive to and from various  
15 locations in his own car to meet with clients; prepare, print and purchase promotional materials;  
16 purchase computer programs and other materials for use in his office; purchase meals, food, beverage  
17 and other gifts for BANK OF AMERICA's clients and potential clients; make cellular phone calls;  
18 make long distance phone calls; generally maintain an office inside his home for the conduct of  
19 activities related to his job duties and responsibilities as Defendant BANK OF AMERICA's  
20 employee.

21 8. BANK OF AMERICA has made and continues to make several "adjustments" or  
22 charges to Mr. MARR's compensation. BANK OF AMERICA charges Mr. MARR for the services  
23 of an Account Executive Assistant ("AEA") who was also a BANK OF AMERICA employee. The  
24 AEA's compensation is paid by Mr. MARR through these adjustments.

25 9. When Mr. MARR finalizes a mortgage on behalf of BANK OF AMERICA, and there  
26 are additional charges, closing costs, processing fees, extension fees and other costs and fees, and the  
27 consumer does not wish to pay these charges, BANK OF AMERICA charges Mr. MARR.

28 ///

1           10.     BANK OF AMERICA policy states that AE's should be given a cash bonus for every  
2 referral. Mr. MARR has had over 40 referrals during his employment and has never been provided  
3 with any bonus for these referrals.

4           11.     BANK OF AMERICA has the sole right to set the mortgage interest rate it offers to  
5 customers. This rates differ based on which BANK OF AMERICA employee is offering the rate, the  
6 customer that is requesting a mortgage and where the property to be covered by the mortgage is  
7 located.

8           12.     If Mr. MARR needs to provide a lower rate than the mortgage interest rate set by  
9 BANK OF AMERICA to guarantee that a consumer enters into the loan, BANK OF AMERICA  
10 charges him the amount necessary to lower the interest rate to the amount the customer requests. This  
11 charge is called an underage. When there is a problem in locking-in a rate for a consumer, Mr.  
12 MARR is charged by BANK OF AMERICA for the difference between the lock-in rate and the actual  
13 interest rate. Any problem in the loan structure results in Mr. MARR being charged by BANK OF  
14 AMERICA. This charge is called a curtailment.

15           13.     BANK OF AMERICA has not acted in good faith in setting the mortgage interest rate  
16 for AEs. The vast majority of mortgages sold by Mr. MARR in particular, and the AEs in general,  
17 require the use of an underage. The use of this underage deprives Mr. MARR of commissions he  
18 would have received but for BANK OF AMERICA's policy of initially inflating the mortgage interest  
19 rate offered by AEs.

20           14.     BANK OF AMERICA represented to Mr. MARR that as part of his employment he  
21 was entitled to, and would, receive deals from banking centers.

22           15.     BANK OF AMERICA has refused to provide Mr. MARR with deals from banking  
23 centers and told him that if he is ever contacted by a banking center he is not allowed to accept any  
24 deals.

25           16.     While Mr. MARR has incurred and continues to incur tremendous expenses as a result  
26 of his employment, BANK OF AMERICA refuses to reimburse him for these expenses.

27           17.     During his employment with BANK OF AMERICA, Mr. MARR became disabled.

28     ///

1 18. Under his contract with BANK OF AMERICA, Mr. MARR became eligible for long  
2 term disability payments on January 23, 2009.

3 19. BANK OF AMERICA's policy states that Mr. MARR should receive long term  
4 disability payments in an amount of 60-percent of his "ABBR." Under BANK of AMERICA policy,  
5 ABBR is calculated based upon an AE's total compensation in 2007.

6 20. BANK OF AMERICA has refused to provide Mr. MARR the long term disability  
7 payments he is entitled under their agreement, instead paying him at a lower rate.

8 **FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS**

9 (Failure to Reimburse Employee for Business Expenses)  
(California Labor Code §2802)

10 21. Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 20  
11 above.

12 22. California Labor Code §2802 provides that employers shall reimburse employees for  
13 all expenses incurred in the performance of their duties.

14 23. BANK OF AMERICA required Mr. MARR to travel to various residences and  
15 businesses throughout the State of California and other states, for purposes of selling mortgages.

16 24. In the ordinary course of his employment and in the process of this travel, Mr. MARR  
17 regularly incurred expenses, including but not limited to: millage; costs for promotional materials; the  
18 salary of his assistant, a BANK OF AMERICA employee; cellular phone charges; enticements  
19 provided to potential customers or actual customers to complete a sale; office expenses including the  
20 purchase of computer software and office supplies; long distance phone charges; meal charges and  
21 other business related expenses incurred in the course of his employment.

22 25. BANK OF AMERICA intentionally and consistently failed to reimburse Mr. MARR  
23 for expenses incurred in the performance of his duties, in violation of California Labor Code §2802.

24 26. Mr. MARR is entitled to the full amount of expenses he incurred, plus interest, and  
25 reasonable attorneys' fees and costs of suit as proscribed by California Labor Code §2802.

26 WHEREFORE, Mr. MARR requests relief as hereinafter provided.

27 ///

28 ///

**SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS**

(Unlawful Wage Deductions)  
(Violation of California Labor Code §221)

27. Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 26 above.

28. California Labor Code §221 provides that an employer may not “collect or receive from an employee any part of wages paid by said employer to said employee.”

29. DEFENDANTS intentionally and consistently charged Mr. MARR for expenses incurred in the performance of his duties including, but not limited to, the salary of his assistant a BANK OF AMERICA EMPLOYEE; closing costs; loan processing fees; extension fees; underage charges (deductions for mortgages under the prevailing rate); uncollected/waived fee charges; misquote and rate lock failure charges; and curtailment charges, in violation of California Labor Code §221.

30. Mr. MARR is entitled to recover the full amount of deducted wages, plus interest, and reasonable attorneys’ fees and costs of suit as proscribed by California Labor Code §218.5.

WHEREFORE, Mr. MARR requests relief as hereinafter provided.

**THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS**

(Failure to Pay Wages)  
(Violation of California Labor Code §200, et seq.)

31. Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 30 above.

32. Pursuant to Labor Code §200, wages include all amounts for labor performed by employees of every description and includes all employee benefits and incentives.

33. Pursuant to Labor Code §204 all wages earned by any person in any employment are due and payable twice during each calendar month.

34. Mr. MARR worked for BANK OF AMERICA continuously from July 2001 through the present.

35. Beginning on January 23, 2009, Mr. MARR became eligible for long term disability payments, a form of wages under Labor Code §§200 and 204.

///



1           36.     Since January 23, 2009 and continuing through the date of this complaint, BANK OF  
2 AMERICA has intentionally, willfully and repeatedly refused and failed to pay Mr. MARR the full  
3 amount of disability payments he is entitled to under their agreement.

4           37.     Mr. MARR's agreement with BANK OF AMERICA entitles him to a cash bonus for  
5 each referral he has. Such bonuses are a form of wages under Labor Code §§200 and 204.

6           38.     Mr. MARR has had over 40 referrals during his employment with BANK OF  
7 AMERICA.

8           39.     BANK OF AMERICA has intentionally, willfully and repeatedly refused and failed to  
9 pay Mr. MARR the bonuses he is entitled to under their agreement.

10          40.     Pursuant to California Labor Code §§ 215 and 216, a willful failure to pay wages and  
11 compensation that is due and owing is a misdemeanor. BANK OF AMERICA has the ability to pay  
12 Mr. MARR the compensation that is due and owing. By wrongfully failing to pay Mr. MARR his  
13 wages, BANK OF AMERICA has violated California Labor Code §§ 215 and 216 and has committed  
14 a misdemeanor.

15          41.     As a proximate result of DEFENDANTS' violation of California Labor Code §§204,  
16 215 and 216, Mr. MARR has suffered, and continues to suffer, damages in an amount according to  
17 proof.

18          42.     Mr. MARR is entitled to recover the full amount of unpaid wages, plus interest, and  
19 reasonable attorneys' fees and costs of suit pursuant to California Labor Code §§218.5 and 2699, due  
20 to BANK OF AMERICA's failure to pay his wages in full.

21                 WHEREFORE, Mr. MARR request relief as hereinafter provided.

22                         **FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
23                                 (Breach of Contract)

24          43.     Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 42  
25 above.

26          44.     Mr. MARR's contract with BANK OF AMERICA as embodied, *inter alia*, in the  
27 Associate Handbook 2005, and the September 28, 2009 modification to the Associate Handbook

28     ///

1 2005, contained an agreement that if Mr. MARR were entitled to long term disability payments in  
 2 2009, these payments would be calculated at 60% of all compensation due to him in 2007.

3 45. Mr. MARR has performed all the covenants, conditions and obligations that were  
 4 under his control as part of the contract.

5 46. BANK OF AMERICA has refused to pay Mr. MARR the disability payments in the  
 6 amount to which he is entitled under their agreement. Instead, BANK OF AMERICA has paid Mr.  
 7 MARR at a lower rate.

8 47. As a legal result of BANK OF AMERICA's breach of contract, Mr. MARR has  
 9 suffered damages and will suffer damages in the future in an amount according to proof.

10 WHEREFORE, Mr. MARR requests relief as hereinafter provided.

11 **FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
 12 (Breach of the Covenant of Good Faith and Fair Dealing)

13 48. Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 47  
 14 above.

15 49. Mr. MARR's contract with BANK OF AMERICA as embodied, *inter alia*, in the  
 16 Retail Sales Compensation Plan, Associate Handbook 2005, the September 28, 2009 modification to  
 17 the Associate Handbook 2005 and further oral agreements contained an implied-in-law covenant of  
 18 good faith and fair dealing that neither party would do anything to injure the right of the other party to  
 19 enjoy the actual benefits of that contract.

20 50. Mr. MARR's contract with BANK OF AMERICA provided for Mr. MARR to receive  
 21 commissions based upon the mortgage rate set exclusively by BANK OF AMERICA in its unfettered  
 22 discretion. When mortgages were sold at a rate lower than that set by BANK OF AMERICA, with  
 23 express approval of BANK OF AMERICA, Mr. MARR received a lower commission than for a  
 24 mortgage sold at or above the rate set by BANK OF AMERICA.

25 51. BANK OF AMERICA had an obligation to set the mortgage rate in good faith.

26 52. BANK OF AMERICA did not exercise its discretion in good faith, but instead set the  
 27 mortgage rate an elevated level in order to deprive Mr. MARR of commissions based upon mortgages  
 28 he sold.



1           53.     Mr. MARR's contract with BANK OF AMERICA provided for Mr. MARR to receive  
2 long term disability payments in an amount of 60% of his total compensation in 2007.

3           54.     BANK OF AMERICA had an obligation to calculate this total compensation in good  
4 faith and to take good faith steps to ensure that Mr. MARR was compensated in accordance with this  
5 agreement.

6           55.     BANK OF AMERICA did not act in good faith, but instead calculated Mr. MARR's  
7 compensation at a lower rate, provided this number to its insurance company and refused, despite  
8 requests from Mr. MARR, to amend this amount to accurately reflect the compensation he earned in  
9 2007.

10          56.     Mr. MARR's contract with BANK OF AMERICA provided that he is eligible to, and  
11 will receive, referrals from banking centers.

12          57.     BANK OF AMERICA had an obligation to refer deals from banking centers to Mr.  
13 MARR in good faith and to not restrict his ability to close such referrals.

14          58.     BANK OF AMERICA did not act in good faith, but instead prevented Mr. MARR  
15 from receiving referrals from banking centers and prevented him from closing any referrals he did  
16 receive from banking centers

17          59.     Mr. MARR has performed all the covenants, conditions and obligations that were  
18 under his control as part of the contract.

19          60.     As a direct and proximate result of BANK OF AMERICA's breach of the covenant of  
20 good faith and fair dealing, Mr. MARR has suffered damages.

21                 WHEREFORE, Mr. MARR requests relief as hereinafter provided.

22                         **SIX CAUSE OF ACTION AGAINST ALL DEFENDANTS**  
23                         (Violation of Business and Professions Code §17200, *et seq.*)

24          61.     Mr. MARR re-alleges and incorporates herein by reference paragraphs 1 through 60  
25 above.

26          62.     BANK OF AMERICA is a "person" as that term is defined under California Business  
27 and Professions Code §17201.

28                 ///

1           63.     California Business and Professions Code §17200 defines unfair competition as any  
2 unlawful, unfair, or fraudulent business act or practice.

3           64.     At all times relevant hereto, by and through the conduct described herein, BANK OF  
4 AMERICA has engaged in unfair and unlawful practices by requiring Mr. MARR adhere to a contract  
5 of adhesion; failing to reimburse Mr. MARR for business expenses incurred while in BANK OF  
6 AMERICA's employ, in violation of California Labor Code §2802; making unlawful deductions from  
7 Mr. MARR's wages in violation of California Labor Code §§215, 216 and 221; failing to pay Mr.  
8 MARR the wages he was owed in violation of California Labor Code §204; failing to act in good  
9 faith; and breaching its contract with Mr. MARR, all in violation of California Business and  
10 Professions Code §17200 et seq., which has thereby deprived Mr. MARR of money and property.

11           65.     By and through the unfair and unlawful business practices described herein, BANK OF  
12 AMERICA has obtained valuable property, money, and services from Mr. MARR and has deprived  
13 him of valuable rights and benefits guaranteed by law, all to his detriment.

14           66.     All the acts described herein as violation of, among other things, California Labor  
15 Code §§204, 215, 216, 221 and 2802, contract of adhesion law, breach of contract law, and the  
16 covenant of good faith and fair dealing, are unlawful and in violation of public policy; and in  
17 addition are immoral, unethical, oppressive and unscrupulous, and thereby constitute unfair and  
18 unlawful business practices in violation of California Business and Professions Code §17200 et seq.  
19 BANK OF AMERICA's violation of California Labor Code §215 and 216 constitute a misdemeanor.

20           67.     Mr. MARR is entitled to, and does, seek such relief as may be necessary to restore to  
21 him the money and property which BANK OF AMERICA has acquired, or of which Mr. MARR has  
22 been deprived, by means of the above described unfair and unlawful business practices.

23           68.     Mr. MARR is further entitled to, and does, seek a declaration that the above described  
24 business practices are unfair and unlawful and that an injunctive relief should be issued restraining  
25 BANK OF AMERICA from engaging in any of the above described unfair and unlawful business  
26 practices in the future.

27           69.     Mr. MARR is further entitled to, and does, seek an award of attorneys' fees, costs and  
28 expenses incurred in the investigation, filing and prosecution of this action pursuant to California

1 Code of Civil Procedure §1021.5, California Business and Professions Code §17200, et seq., Labor  
2 Code §§218.5 and 2802, and any other applicable provision of law.

3 70. Mr. MARR has no plain, speedy, and/or adequate remedy at law to redress the injuries  
4 which he has suffered as a consequence of the unfair and unlawful business practices of BANK OF  
5 AMERICA. As a result of the unfair and unlawful business practices described above, Mr. MARR  
6 suffered and will continue to suffer irreparable harm unless BANK OF AMERICA is restrained from  
7 continuing to engage in these unfair and unlawful business practices. In addition, BANK OF  
8 AMERICA should be required to disgorge the unpaid moneys to Mr. MARR.

9 WHEREFORE, Mr. MARR requests relief as hereinafter provided.

10 **JURY DEMAND**

11 Mr. MARR demands a jury to all issues joined herein.

12 **PRAAYER FOR RELIEF**

13 WHEREFORE, Mr. MARR requests relief as follows:

- 14 1. For general damages according to proof;
- 15 2. For special damages according to proof;
- 16 3. For costs of suit;
- 17 4. For reasonable attorneys fees (For the First, Second, Third and Sixth Causes of  
18 Action);
- 19 5. For interest at the maximum legal rate on all sums awarded;
- 20 6. For an order preliminarily and permanently enjoining BANK OF AMERICA from  
21 engaging in the practices challenged herein (as to the Sixth Cause of Action);

22 ///

23 ///

24 ///

1           7.       For an order for full restitution of all monies, as necessary and according to proof, to  
2 restore any and all monies withheld, acquired, and/or converted by BANK OF AMERICA by means  
3 of the unfair practices complained of herein (as to the Sixth Cause of Action); and

4           8.       For such other relief as the Court deems just and proper.

5  
6 DATED: October 22, 2009

ADAMS | NYE | TRAPANI | BECHT LLP

7  
8  
9 By:



DAVID J. BECHT  
MICHAEL SACHS  
MYTHILY SIVARAJAH  
Attorneys for Plaintiff  
WILLIAM MARR

CM-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): DAVID J. BECHT, ESQ., S.B.N. 104208 MICHAEL SACHS, ESQ., S.B.N. 235048 ADAMS   NYE   TRAPANI   BECHT LLP 222 KEARNY STREET - SEVENTH FLOOR SAN FRANCISCO, CA 94108-4521 TELEPHONE NO.: (415) 982-8955 FAX NO. (Optional): (415) 982-2042 E-MAIL ADDRESS (Optional): dbecht@adamsnye.com - msachs@adamsnye. ATTORNEY FOR (Name): Plaintiff, WILLIAM MARR	FOR COURT USE ONLY ENDORSEMENT FILED San Francisco County Superior Court AUG 20 2009 GORDON PARKER, Clerk CHRISTINE E. BATTISTA Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO STREET ADDRESS: 400 McALLISTER STREET MAILING ADDRESS: SAME CITY AND ZIP CODE: SAN FRANCISCO, CA 94102 BRANCH NAME:	CASE NUMBER: CGC-09-491675
PLAINTIFF/PETITIONER: WILLIAM MARR	JUDICIAL OFFICER:
DEFENDANT/RESPONDENT: BANK OF AMERICA NATIONAL ASSOCIATION	DEPT.:
NOTICE OF RELATED CASE	

Identify, in chronological order according to date of filing, all cases related to the case referenced above.

1. a. Title: Contreras et al v. BANK OF AMERICA NATIONAL ASSOCIATION, et al
  - b. Case number: CGC-07-467749
  - c. Court: ☒ same as above  
☐ other state or federal court (name and address):
  - d. Department: 210
  - e. Case type: ☐ limited civil ☒ unlimited civil ☐ probate ☐ family law ☐ other (specify):
  - f. Filing date: October 1, 2007
  - g. Has this case been designated or determined as "complex?" ☐ Yes ☒ No
  - h. Relationship of this case to the case referenced above (check all that apply):
    - ☐ involves the same parties and is based on the same or similar claims.
    - ☒ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
    - ☐ involves claims against, title to, possession of, or damages to the same property.
    - ☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
    - ☐ Additional explanation is attached in attachment 1h
  - i. Status of case:
    - ☒ pending
    - ☐ dismissed ☐ with ☐ without prejudice
    - ☐ disposed of by judgment
2. a. Title:
  - b. Case number:
  - c. Court: ☐ same as above  
☐ other state or federal court (name and address):
  - d. Department:



CM-015

PLAINTIFF/PETITIONER: WILLIAM MARR	CASE NUMBER:
DEFENDANT/RESPONDENT: BANK OF AMERICA NATIONAL ASSOCIATION	

## 2. (continued)

e. Case type: ☐ limited civil ☐ unlimited civil ☐ probate ☐ family law ☐ other (specify):

f. Filing date:

g. Has this case been designated or determined as "complex?" ☐ Yes ☐ No

h. Relationship of this case to the case referenced above (check all that apply):

- ☐ involves the same parties and is based on the same or similar claims.
- ☐ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- ☐ involves claims against, title to, possession of, or damages to the same property.
- ☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- ☐ Additional explanation is attached in attachment 2h

i. Status of case:

- ☐ pending
- ☐ dismissed ☐ with ☐ without prejudice
- ☐ disposed of by judgment

## 3. a. Title:

b. Case number:

c. Court: ☐ same as above☐ other state or federal court (name and address):

d. Department:

e. Case type: ☐ limited civil ☐ unlimited civil ☐ probate ☐ family law ☐ other (specify):

f. Filing date:

g. Has this case been designated or determined as "complex?" ☐ Yes ☐ No

h. Relationship of this case to the case referenced above (check all that apply):

- ☐ involves the same parties and is based on the same or similar claims.
- ☐ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- ☐ involves claims against, title to, possession of, or damages to the same property.
- ☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- ☐ Additional explanation is attached in attachment 3h

i. Status of case:

- ☐ pending
- ☐ dismissed ☐ with ☐ without prejudice
- ☐ disposed of by judgment

4. ☐ Additional related cases are described in Attachment 4. Number of pages attached: \_\_\_\_\_

Date: August 14, 2009

Michael Sachs, SBN 235048

(TYPE OR PRINT NAME OF PARTY OR ATTORNEY)



(SIGNATURE OF PARTY OR ATTORNEY)

CM-015

PLAINTIFF/PETITIONER: WILLIAM MARR	CASE NUMBER:
DEFENDANT/RESPONDENT: BANK OF AMERICA NATIONAL ASSOCIATION	

**PROOF OF SERVICE BY FIRST-CLASS MAIL  
NOTICE OF RELATED CASE**

**(NOTE: You cannot serve the Notice of Related Case if you are a party in the action. The person who served the notice must complete this proof of service. The notice must be served on all known parties in each related action or proceeding.)**

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (*specify*):
  
  2. I served a copy of the *Notice of Related Case* by enclosing it in a sealed envelope with first-class postage fully prepaid and (*check one*):
    - a. ☐ deposited the sealed envelope with the United States Postal Service.
    - b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
  
  3. The *Notice of Related Case* was mailed:
    - a. on (*date*):
    - b. from (*city and state*):
  
  4. The envelope was addressed and mailed as follows:
 


<ol style="list-style-type: none"> <li>a. Name of person served:</li>   <li>Street address:</li> <li>City:</li> <li>State and zip code:</li>   <li>b. Name of person served:</li>   <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>	<ol style="list-style-type: none"> <li>c. Name of person served:</li>   <li>Street address:</li> <li>City:</li> <li>State and zip code:</li>   <li>d. Name of person served:</li>   <li>Street address:</li> <li>City:</li> <li>State and zip code:</li> </ol>
--	--
- ☐ Names and addresses of additional persons served are attached. (*You may use form POS-030(P).*)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)



## What is BASF's Mediation Service?

Mediation is a voluntary, private dispute resolution process in which a trained mediator assists the parties in reaching an outcome that is mutually agreeable.

Mediation Services was established by The Bar Association of San Francisco (BASF) with extensive input from experienced mediators, litigators and judges. This traditional mediation service is an approved alternative to court ordered Arbitration or Early Settlement.




## How Much Does the Service Cost?

Mediators generously provide one hour of preparation and two hours of session time free of charge as a service to BASF and the community. To qualify for the pro-bono hours, parties must file the Consent to Mediate form with BASF. Hourly fees beyond those three hours vary depending on the mediator selected. BASF charges a small administrative fee, which pays for the costs of running the program.



## Who Are the Mediators?

Experienced mediation professionals are available to assist in most areas of dispute, ranging from multi-party commercial matters to individuals in conflict. Each has been pre-approved pursuant to strict educational and experience requirements. In fact, our mediators average 15 years of mediation experience and 125 hours of formal mediation training.



## How Does it Work?

BASF's Mediation Services works quickly, matching a qualified mediator to a case within days. The assignment process is flexible; experienced BASF staff can suggest a mediator, or you can request three biographies to choose from, or request a particular mediator from our Web site.



## Who Can Use the Service?

The service can be utilized by anyone whether or not the dispute has been filed in a court. If a legal action is already underway, it can be used at any time during the litigation process and is not limited to San Francisco County litigants.



## More Information

Our Web site - [www.sfbbar.org/mediation](http://www.sfbbar.org/mediation) - provides photographs, short biographies and hourly rates of our mediators. You can search by name or by area of law.

If you don't see the area you need in our 30+ panels, just contact us at [adr@sfbbar.org](mailto:adr@sfbbar.org); it is very likely we can match your need with one of our panelists.

## **Alternative Dispute Resolution (ADR) Program Information Package**

# **Alternatives to Trial**

**There are other ways to  
resolve a civil dispute.**

The plaintiff must serve a copy of the ADR information package  
on each defendant along with the complaint. (CRC 3.221(c))



**Superior Court of California  
County of San Francisco**

## Introduction

Did you know that most civil lawsuits settle without a trial?

And did you know that there are a number of ways to resolve civil disputes without having to sue somebody?

These alternatives to a lawsuit are known as alternative dispute resolutions (ADR). The most common forms of ADR are mediation, arbitration and case evaluation. There are a number of other kinds of ADR as well.

In ADR, trained, impartial persons decide disputes or help parties decide disputes themselves. These persons are called neutrals. For example, in mediation, the neutral is the mediator. Neutrals normally are chosen by the disputing parties or by the court. Neutrals can help parties resolve disputes without having to go to court.

ADR is not new. ADR is available in many communities through dispute resolution programs and private neutrals.

## Advantages of ADR

ADR can have a number of advantages over a lawsuit.

- *ADR can save time.* A dispute often can be resolved in a matter of months, even weeks, through ADR, while a lawsuit can take years.
- *ADR can save money.* Court costs, attorneys fees, and expert fees can be saved.
- *ADR can be cooperative.* This means that the parties having a dispute may work together with the neutral to resolve the dispute and agree to a remedy that makes sense to them, rather than work against each other.
- *ADR can reduce stress.* There are fewer, if any, court appearances. And because ADR can be speedier, and save money, and because the parties are normally cooperative, ADR is easier on the nerves. The parties don't have a lawsuit hanging over their heads for years.
- *ADR encourages participation.* The parties may have more chances to tell their side of the story than in court and may have more control over the outcome.
- *ADR is flexible.* The parties can choose the ADR process that is best for them. For example, in mediation the parties may decide how to resolve their dispute.
- *ADR can be more satisfying.* For all the above reasons, many people have reported a high degree of satisfaction with ADR.



## **ALTERNATIVE DISPUTE RESOLUTION PROGRAMS Of the San Francisco Superior Court**

"It is the policy of the Superior Court that every noncriminal, nonjuvenile case participate either in an early settlement conference, mediation, arbitration, early neutral evaluation or some other alternative dispute resolution process prior to a mandatory settlement conference or trial."  
(Superior Court Local Rule 4)

This guide is designed to assist attorneys, their clients and self-represented litigants in complying with San Francisco Superior Court's alternative dispute resolution ("ADR") policy. Attorneys are encouraged to share this guide with clients. By making informed choices about dispute resolution alternatives, attorneys, their clients and self-represented litigants may achieve a more satisfying resolution of civil disputes.

The San Francisco Superior Court currently offers three ADR programs for general civil matters; each program is described below:

- 1) Judicial Arbitration
- 2) Mediation
- 3) The Early Settlement Program (ESP) in conjunction with the San Francisco Bar Association.

### **JUDICIAL ARBITRATION**

#### ***Description***

In arbitration, a neutral "arbitrator" presides at a hearing where the parties present evidence through exhibits and testimony. The arbitrator applies the law to the facts of the case and makes an award based upon the merits of the case. When the Court orders a case to arbitration it is called judicial arbitration. The goal of arbitration is to provide parties with an adjudication that is earlier, faster, less formal, and usually less expensive than a trial. Upon stipulation of all parties, other civil matters may be submitted to judicial arbitration.

Although not currently a part of the Court's ADR program, civil disputes may also be resolved through private arbitration. Here, the parties

A mediator does not propose a judgment or provide an evaluation of the merits and value of the case. Many attorneys and litigants find that mediation's emphasis on cooperative dispute resolution produces more satisfactory and enduring resolutions. Mediation's non-adversarial approach is particularly effective in disputes in which the parties have a continuing relationship, where there are multiple parties, where equitable relief is sought, or where strong personal feelings exist.

### ***Operation***

San Francisco Superior Court Local Court Rule 4 **provides three different voluntary mediation programs** for civil disputes. An appropriate program is available for all civil cases, regardless of the type of action or type of relief sought.

To help litigants and attorneys identify qualified mediators, the Superior Court maintains a list of mediation providers whose training and experience have been reviewed and approved by the Court. The list of court approved mediation providers can be found at [www.sfgov.org/courts](http://www.sfgov.org/courts). Litigants are not limited to mediators on the court list and may select any mediator agreed upon by all parties. A mediation provider need not be an attorney.

Local Rule 4.2 D allows for mediation in lieu of judicial arbitration, so long as the parties file a stipulation to mediate within 240 days from the date the complaint is filed. If settlement is not reached through mediation, a case proceeds to trial as scheduled.

### ***Private Mediation***

The Private Mediation program accommodates cases that wish to participate in private mediation to fulfill the court's alternative dispute resolution requirement. The parties select a mediator, panel of mediators or mediation program of their choice to conduct the mediation. The cost of mediation is borne by the parties equally unless the parties agree otherwise.

Parties in civil cases that have not been ordered to arbitration may consent to private mediation at any point before trial. Parties willing to submit a matter to private mediation should indicate this preference on the Stipulation to Alternative Dispute Resolution form or the Case Management Statement (CM-110). Both forms are attached to this packet.

## **Cost**

Generally, the cost of Private Mediation ranges from \$100 per hour to \$800 per hour and is shared equally by the parties. Many mediators are willing to adjust their fees depending upon the income and resources of the parties. Any party who meets certain eligibility requirements may ask the court to appoint a mediator to serve at no cost to the parties.

The Mediation Services of the Bar Association of San Francisco provides three hours of mediation time at no cost with a \$250 per party administrative fee.

There is no charge for participation in the Judicial Mediation program.

## **EARLY SETTLEMENT PROGRAM**

### ***Description***

The Bar Association of San Francisco, in cooperation with the Court, offers an Early Settlement Program ("ESP") as part of the Court's settlement conference calendar. The goal of early settlement is to provide participants an opportunity to reach a mutually acceptable settlement that resolves all or part of the dispute. The two-member volunteer attorney panel reflects a balance between plaintiff and defense attorneys with at least 10 years of trial experience.

As in mediation, there is no set format for the settlement conference. A conference typically begins with a brief meeting with all parties and counsel, in which each is given an opportunity to make an initial statement. The panelists then assist the parties in understanding and candidly discussing the strengths and weaknesses of the case. The Early Settlement Conference is considered a "quasi-judicial" proceeding and, therefore, is not entitled to the statutory confidentiality protections afforded to mediation.

### ***Operation***

Civil cases enter the ESP either voluntarily or through assignment by the Court. Parties who wish to choose the early settlement process should indicate this preference on the status and setting conference statement.

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

400 McAllister Street, San Francisco, CA 94102-4514

Case No. \_\_\_\_\_

v. Plaintiff

**STIPULATION TO ALTERNATIVE  
DISPUTE RESOLUTION**

Defendant

The parties hereby stipulate that this action shall be submitted to the following alternative dispute resolution process:

- |   |   |   |
|---|---|---|
| <input type="checkbox"/> Private Mediation                  | <input type="checkbox"/> Mediation Services of BASF | <input type="checkbox"/> Judicial Mediation |
| <input type="checkbox"/> Binding arbitration                |   | Judge _____                                 |
| <input type="checkbox"/> Non-binding judicial arbitration   |   | Judge _____                                 |
| <input type="checkbox"/> BASF Early Settlement Program      |   |   |
| <input type="checkbox"/> Other ADR process (describe) _____ |   |   |

Plaintiff(s) and Defendant(s) further agree as follows:

_____ Name of Party Stipulating	_____ Name of Party or Attorney Executing Stipulation	_____ Signature of Party or Attorney
------------------------------------	--	---

<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	<input type="checkbox"/> Cross-defendant	Dated: _____
------------------------------------	------------------------------------	--	--------------

_____ Name of Party Stipulating	_____ Name of Party or Attorney Executing Stipulation	_____ Signature of Party or Attorney
------------------------------------	--	---

<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	<input type="checkbox"/> Cross-defendant	Dated: _____
------------------------------------	------------------------------------	--	--------------

_____ Name of Party Stipulating	_____ Name of Party or Attorney Executing Stipulation	_____ Signature of Party or Attorney
------------------------------------	--	---

<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	<input type="checkbox"/> Cross-defendant	Dated: _____
------------------------------------	------------------------------------	--	--------------

☐ Additional signature(s) attached





## Superior Court of California County of San Francisco



HON. JAMES J. MCBRIDE  
PRESIDING JUDGE

### Judicial Mediation Program

JENIFFER B. ALCANTARA  
ADR PROGRAM ADMINISTRATOR

The Judicial Mediation program offers mediation of complex civil litigation by a San Francisco Superior Court judge familiar with the area of the law that is the subject of the controversy. Cases that will be considered for participation in the program include, but are not limited to professional malpractice, construction, employment, insurance coverage disputes, mass torts and complex commercial litigation. Judicial mediation offers civil litigants the opportunity to engage in early mediation of a case shortly after filing the complaint in an effort to resolve the matter before substantial funds are expended. This program may also be utilized at anytime throughout the litigation process. The panel of judges currently participating in the program includes:

The Honorable Gail Dekreon  
The Honorable Ernest H. Goldsmith  
The Honorable Harold E. Kahn  
The Honorable Curtis Karnow  
The Honorable Patrick J. Mahoney  
The Honorable Tomar Mason

The Honorable John E. Munter  
The Honorable Ronald Quidachay  
The Honorable A. James Robertson, II  
The Honorable Lillian Sing  
The Honorable John K. Stewart  
The Honorable Mary E. Wiss

Parties interested in judicial mediation should file the Stipulation to Alternative Dispute Resolution form attached to this packet indicating a joint request for inclusion in the program and deliver a courtesy copy to Dept. 212. A preference for a specific judge may be indicated but specific request are not guaranteed. Please allow at least 30 days for scheduling. The court Alternative Dispute Resolution Program Administrator will facilitate assignment of cases that qualify for the program.

Note: Space is limited. Submission of a stipulation to judicial mediation does not guarantee inclusion in the program. You will receive written notification from the court as to the outcome of your application.

Superior Court Alternative Dispute Resolution  
400 McAllister Street, Room 103, San Francisco, CA 94102  
(415) 551-3876



#9

### **NOTICE TO PLAINTIFF**

A Case Management Conference is set for

**DATE: JAN-22-2010**

**TIME: 9:00AM**

**PLACE: Department 212  
400 McAllister Street  
San Francisco, CA 94102-3680**

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference.

However, it would facilitate the issuance of a case management order **without an appearance** at the case management conference if the case management statement is filed, served and lodged in Department 212 twenty-five (25) days before the case management

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state.

### **ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS**

IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A MANDATORY SETTLEMENT CONFERENCE OR TRIAL.  
(SEE LOCAL RULE 4)

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

**[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]**

Superior Court Alternative Dispute Resolution Coordinator  
400 McAllister Street, Room 103  
San Francisco, CA 94102  
(415) 551-3876

See Local Rules 3.6, 6.0 C and 10 D re stipulation to commissioners acting as temporary judges

**INSTRUCTIONS:** All applicable boxes must be checked, and the specified information must be provided.

- Page 1 of 4

CM-110

PETITIONER:

CASE NUMBER:

RESPONDENT:

or parties are willing to participate in (check all that apply):

Mediation

Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, rule 3.822)

Nonbinding judicial arbitration under Code of Civil Procedure section 1141.12 (discovery to remain open until 30 days before trial; order required under Cal. Rules of Court, rule 3.822)

Binding judicial arbitration

Binding private arbitration

Neutral case evaluation

Other (specify):

This matter is subject to mandatory judicial arbitration because the amount in controversy does not exceed the statutory limit.

Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.

This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court (specify exemption):

**Settlement conference**

The party or parties are willing to participate in an early settlement conference (specify when):

**Insurance coverage**

☐ Insurance carrier, if any, for party filing this statement (name):

Reservation of rights: ☐ Yes ☐ No

☐ Coverage issues will significantly affect resolution of this case (explain):

**Jurisdiction**

Indicate any matters that may affect the court's jurisdiction or processing of this case, and describe the status.

☐ Bankruptcy ☐ Other (specify):

Status:

**Related cases, consolidation, and coordination**

a. ☐ There are companion, underlying, or related cases.

(1) Name of case:

(2) Name of court:

(3) Case number:

(4) Status:

☐ Additional cases are described in Attachment 14a.

b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by (name party):

**15. Bifurcation**

☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (specify moving party, type of motion, and reasons):

**16. Other motions**

☐ The party or parties expect to file the following motions before trial (specify moving party, type of motion, and issues):

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY DAVID J. BECHT, ESQ. MICHAEL SACHS, ESQ. ADAMS   NYE   TRAPANI 222 KEARNY STREET SAN FRANCISCO, CA TELEPHONE NO. (415) 434-1111 E-MAIL ADDRESS (Optional) db@adamsnyetrapani.com ATTORNEY FOR (Name) Pl	(City and address)  	FOR COURT USE ONLY  
SUPERIOR COURT OF STREET ADDRESS: 4 MAILING ADDRESS: 5 CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF/PETITION		
DEFENDANT/RESPONDENT		
CASE NUMBER 491675		

TO (insert name)

The sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (or the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) on you.

If you are a partnership, or other entity, this summons is being served on you as the authorized person to receive service of process on behalf of such entity. You are authorized by you to acknowledge receipt of this summons and to complete on the day you sign the

David J. Becht, Esq.  
 Michael Sachs, Esq.  
 Adams | Nye | Trapani | Becht LLP  
 222 Kearny Street - Seventh Floor  
 San Francisco, CA 94108-4521

ATION

Section 415.30 of the California Code of Civil Procedure, which provides that the date of mailing shown below may subject you to the payment of expenses incurred in serving a summons.

(including a partnership), or other entity, this summons is being served on you as the authorized person to receive service of process on behalf of such entity. You are authorized by you to acknowledge receipt of this summons and to complete on the day you sign the



SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

## RECEIPT

iling):

Injunctive Relief and Demand for Jury; Civil Case Cover  
 nt Conference; Alternative Dispute Resolution (ADR)  
 Dispute Resolution form; Superior Court of California -  
 aformation

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF  
 ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

Page 1 of 1

adams nye trapani becht LLP  
 222 Kearny Street  
 Seventh Floor  
 San Francisco, CA  
 94108-4521

TO (insert name of party being served): BANK OF AMERICA NATIONAL ASSOCIATION

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF  
ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)





**Day, Amira**

**From:** Walker, Cindy M - Legal [cindy.m.walker@bankofamerica.com]  
**Sent:** Friday, November 20, 2009 4:58 PM  
**To:** dbecht@adamsnye.com; msachs@adamsnye.com  
**Cc:** Day, Amira  
**Subject:** Marr v. BANA - acknowledgement  
**Attachments:** Acknowledgment.pdf

Attached please find the signed Acknowledgment. Thanks. Cindy

Cindy Walker  
Assistant General Counsel  
Bank of America  
30870 Russell Ranch Road  
Mail Code CA6-915-C1-17  
Windsor Village CA 91360  
913-473-6377 Office  
913-223-3901 Fax  
cindy.m.walker@bankofamerica.com

**Confidentiality Notice.** This transmittal is a confidential attorney-client communication or may otherwise be privileged or confidential. If you are not the intended recipient, you are hereby notified that you have received this transmittal in error and that any review, dissemination, distribution, or copying of this transmittal is strictly prohibited. If you have received this communication in error, please contact the sender immediately and immediately delete this message and all its attachments, if any.

12/21/2009

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): DAVID J. BECHT, ESQ., S.B.N. 104208 MICHAEL SACHS, ESQ., S.B.N. 235048 ADAMS   NYE   TRAPANI   BECHT LLP 222 KEARNY STREET - SEVENTH FLOOR SAN FRANCISCO, CA 94108-4521 TELEPHONE NO: (415) 982-8955 FAX NO. (Optional): (415) 982-2042 E-MAIL ADDRESS (Optional): dbecht@adamsnye.com - msachs@adamsnye.c ATTORNEY FOR (Name): Plaintiff, WILLIAM MARR	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO STREET ADDRESS: 400 McALLISTER STREET MAILING ADDRESS: SAME CITY AND ZIP CODE: SAN FRANCISCO, CA 94102 BRANCH NAME:	
PLAINTIFF/PETITIONER: WILLIAM MARR  DEFENDANT/RESPONDENT: BANK OF AMERICA NATIONAL ASSOCIATION	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL	CASE NUMBER: 491675

 TO (insert name of party being served): BANK OF AMERICA NATIONAL ASSOCIATION

### NOTICE


The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: October 26, 2009

MICHAEL SACHS, ESQ., S.B.N. 235048

(TYPE OR PRINT NAME)

  
 (SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

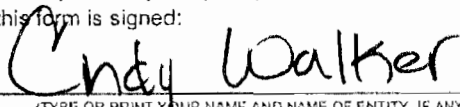
### ACKNOWLEDGMENT OF RECEIPT


This acknowledges receipt of (to be completed by sender before mailing):

1. ☒ A copy of the summons and of the complaint.
2. ☒ Other: (specify): First Amended Complaint For Damages, Injunctive Relief and Demand for Jury; Civil Case Cover Sheet; Notice of Related Case; Notice of Case Management Conference; Alternative Dispute Resolution (ADR) Program Information Package; Stipulation to Alternative Dispute Resolution form; Superior Court of California - County of San Francisco - Judicial Mediation Program information

(To be completed by recipient):

Date this form is signed:

  
 (TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY,  
 ON WHOSE BEHALF THIS FORM IS SIGNED)

  
 (SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF  
 ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)



**COPY**

PATRICIA K. GILLETTE (STATE BAR NO. 74461)  
pgillette@orrick.com  
AMIRA B. DAY (STATE BAR NO. 239045)  
aday@orrick.com  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
The Orrick Building  
405 Howard Street  
San Francisco, CA 94105-2669  
Telephone: +1-415-773-5700  
Facsimile: +1-415-773-5759

Attorneys for Defendant  
BANK OF AMERICA, NATIONAL ASSOCIATION

ENDORSED  
FILED  
San Francisco County Superior Court

DEC 21 2009

GORDON PARK-LI, Clerk  
BY: RONNIE OTERO  
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

WILLIAM MARR,

Plaintiff,

v.

BANK OF AMERICA, NATIONAL  
ASSOCIATION and DOES 1 through 100,  
inclusive,

Defendant.

CASE NO. CGC 09 491675

**ANSWER TO FIRST AMENDED  
COMPLAINT FOR DAMAGES,  
INJUNCTIVE RELIEF AND  
DEMAND FOR JURY TRIAL**

Defendant Bank of America, National Association ("Defendant"), responds to the  
unverified First Amended Complaint filed by Plaintiff William Marr ("Plaintiff") on or about  
October 23, 2009 (the "Complaint") as follows:

(1) Pursuant to California Code of Civil Procedure Section 431.30(d) Defendant  
denies each and every allegation set forth in Plaintiff's Complaint.

(2) Defendant further denies, generally and specifically, that Plaintiff is entitled to any  
of the relief requested; that Defendant is guilty of any wrongful conduct or omission, whether  
alleged or otherwise; and that conduct or omissions of Defendant caused any injury or damage to  
Plaintiff in the amount alleged, to be alleged, or otherwise.



**AFFIRMATIVE DEFENSES**

Without admitting any facts alleged by Plaintiff, Defendant also pleads the following separate and affirmative defenses to the Complaint:

**FIRST DEFENSE**

1. As a separate defense to the Complaint and each cause of action therein, Defendant alleges that Plaintiff has failed to state facts sufficient to constitute a cause of action.

**SECOND DEFENSE**

2. As a separate defense to the Complaint and each cause of action therein, Defendant alleges that Plaintiff failed to take reasonable steps to avoid harm.

**THIRD DEFENSE**

3. As a separate defense to the Complaint and each cause of action therein, Plaintiff's claims are barred by any applicable statutes of limitation, including but not limited to California Code of Civil Procedure sections 337, 338, 339, 340, and 343 California Business and Professions Code section 17208 and 29 U.S.C. section 1113.

**FOURTH DEFENSE**

4. As a separate defense to the Complaint and each cause of action therein, Plaintiff is precluded from recovering any amounts from Defendant because Defendant has paid Plaintiff all sums legally due.

**FIFTH DEFENSE**

5. As a separate defense to the Complaint and each cause of action therein, Plaintiff's recovery in this action is barred by Plaintiff's failure to exercise reasonable care and diligence to mitigate his alleged damages. Alternatively, Defendant alleges that any recovery by Plaintiff should be reduced by those damages that Plaintiff failed to mitigate.

**SIXTH DEFENSE**

6. As a separate defense to the Complaint and each cause of action therein, Plaintiff has compromised and/or released some or all of claims asserted in this lawsuit and, accordingly, such claims are barred by the doctrines of compromise, settlement, and/or release.

///

**SEVENTH DEFENSE**

7. As a separate defense to the Complaint and each cause of action therein, Defendant alleges that any claim by Plaintiff based on any alleged oral contract may be barred by the Statute of Frauds set forth in section 1624 of the California Civil Code.

**EIGHTH DEFENSE**

8. As a separate defense to the Complaint and each cause of action therein, Defendant alleges that any act(s) and/or omissions(s) which may be found to be in violation of the rights afforded by applicable law were not willful but occurred in good faith with reasonable grounds for believing that Defendant was in full compliance with applicable law.

**NINTH DEFENSE**

9. As a separate defense to the Complaint and each cause of action therein, Plaintiff has failed to comply with California Labor Code sections 2854, 2856, 2858 and 2859, to the extent that Plaintiff failed to use ordinary care and diligence in the performance of Plaintiff's duties, failed to substantially comply with Defendant's reasonable directions, and failed to exercise a reasonable degree of skill in performing Plaintiff's job duties.

**TENTH DEFENSE**

10. As a separate defense to the Complaint and each cause of action therein, Plaintiff's claims are barred, in whole or in part, by the doctrines of unclean hands, laches, estoppel, and/or waiver.

**ELEVENTH DEFENSE**

11. As a separate defense to the Complaint and each cause of action therein, Any recovery by Plaintiff is barred or must be reduced as a result of Plaintiff's comparative fault.

**TWELFTH DEFENSE**

12. As a separate defense to the Complaint and each cause of action therein, Plaintiff consented to the alleged acts and/or conduct, if any.

**THIRTEENTH DEFENSE**

13. As a separate defense to the Complaint and each cause of action therein, Defendant alleges that the Complaint fails to state a claim for which relief may be granted that

1 provides for compensatory, consequential or liquidated damages, or any other damages, costs,  
2 fees, injunctive or other equitable relief, allowed by applicable law.

### 3 **FOURTEENTH DEFENSE**

4 14. As a separate defense to the Complaint and to each claim therein, Defendant  
5 alleges that California Business and Professions Code Section 17200 is unconstitutionally vague  
6 as applied here in violation of Defendant's rights of due process and equal protection under the  
7 United States Constitution and the California Constitution.

### 8 **FIFTEENTH DEFENSE**

9 15. As a separate defense to the Complaint and to each claim therein, Plaintiff's claims  
10 are barred in whole or in part because Defendant had an honest, good-faith belief that all  
11 decisions with respect to Plaintiff's employment were made solely for legitimate, business-related  
12 reasons and were reasonably based upon the facts as Defendant understood them.

### 13 **SIXTEENTH DEFENSE**

14 16. As a separate defense to the Complaint and to each claim therein, Defendant  
15 alleges that some or all of Plaintiff's claims are barred by the doctrine of res judicata and/or  
16 collateral estoppel.

### 17 **SEVENTEENTH AFFIRMATIVE DEFENSE**

18 17. As a separate defense to the Complaint and to each claim therein, Defendant  
19 alleges that the claims for equitable and/or declaratory relief asserted by Plaintiff are barred  
20 because Plaintiff has an adequate remedy at law for his claims.

### 21 **EIGHTEENTH AFFIRMATIVE DEFENSE**

22 18. As a separate defense to the Complaint and to each claim therein, to the extent any  
23 damages were sustained by Plaintiff, which is expressly denied, Defendant alleges that such  
24 damages were proximately, wholly or in part caused by Plaintiff's own negligence, comparative  
25 fault, actions, inactions, or delay in acting.

### 26 **NINETEENTH AFFIRMATIVE DEFENSE**

27 19. As a separate defense to the Complaint and to each claim therein, Plaintiff  
28 consented to and/or ratified some or all of the actions now complained of.

**TWENTIETH AFFIRMATIVE DEFENSE**

20. As a separate defense to the Complaint and to each claim therein, no conduct or omission by Defendant was the cause in fact or proximate cause of any injury allegedly suffered by Plaintiff.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

21. As a separate defense to the Complaint, Plaintiff's claims are subject to good faith disputes over wages.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

22. As a separate defense to the Complaint and to each claim therein, Plaintiff's claims are barred by payment, setoff and/or accord and satisfaction.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

23. As a separate defense to the Complaint and to each claim therein, Plaintiff engaged in willful misconduct which precludes maintenance of this action and was a proximate cause of the claimed damages, if any damages were sustained.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

24. As a separate defense to the Complaint and Plaintiff's Sixth Cause of Action, some or all of Plaintiff's claim(s) under California Business and Professions Code section 17200 may be barred by the absolute barrier defense.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

25. As a separate defense to the Complaint and to each claim therein, Plaintiff's claims are barred because any recovery from Morgan Stanley would result in unjust enrichment.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

26. As a separate defense to the Complaint, Plaintiff lacks standing to bring some or all of his claims.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

27. As a separate defense to the Complaint and Plaintiff's Sixth cause of action, Plaintiff lacks an independently actionable claim on which to base a claim under California Business & Professions Code Section 17200, *et seq.*



**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

28. As a separate defense to the Complaint, Defendant has not committed any act which is "unlawful," "unfair," "deceptive," or "fraudulent" within the meaning of California Business & Professions Code Section 17200, *et seq.*

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

29. As a separate defense to the Complaint and each cause of action therein, Plaintiff failed, in whole or in part, and continues to fail, in whole or in part, to take reasonable steps to mitigate his damages.

**THIRTIETH AFFIRMATIVE DEFENSE**

30. As a separate defense to the Complaint and each cause of action therein, any and all acts, occurrences and damages alleged or referred to in the Complaint were proximately caused by the bad faith of Plaintiff in that Plaintiff failed to deal fairly, honestly and reasonably with Defendant; therefore, the comparative bad faith of Plaintiff reduces his right to recover, if any, by the amount which his bad faith contributed to the damages alleged.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

31. As a separate defense to the Complaint, Plaintiff fails to state a claim for relief under California Labor Code section 2699, *et seq.*

**THIRTY-SECOND DEFENSE**

32. As a separate defense to the Complaint, Plaintiff has failed to state facts sufficient to constitute a claim for special damages.

**THIRTY-THIRD DEFENSE**

33. As a separate defense to the Complaint, Plaintiff may have failed to exhaust his administrative remedies under applicable law and/or failed to comply with all prerequisites to bringing some of all of his claims.

**THIRTY-FOURTH DEFENSE**

34. As a separate defense to the Complaint and each cause of action therein, to the extent Plaintiff alleges that Defendant has an obligation to which full performance has not been rendered or excused, the obligation is illusory, void and unenforceable, and/or there has been a



1 failure of consideration.

2 **THIRTY-FIFTH DEFENSE**

3 35. As a separate defense to the Complaint and each cause of action therein,  
4 Defendant alleges that to the extent Plaintiff alleges that Defendant has an obligation to which full  
5 performance has not been rendered or excused, not all conditions to said obligations occurred.

6 **THIRTY-SIXTH DEFENSE**

7 36. As a separate defense to the Complaint and each cause of action therein,  
8 Defendant alleges that Plaintiff by his own acts and omissions, breach of duty, failure to perform,  
9 and by his own breaches of the implied covenant of good faith and fair dealing, may have  
10 breached the contract(s) Plaintiff alleges to have existed and therefore is not entitled to any relief  
11 under the alleged contract(s).

12 **THIRTY-SEVENTH DEFENSE**

13 37. As a separate defense to the Complaint and each cause of action therein,  
14 Defendant alleges that one or more of Plaintiff's claims is pre-empted by the Employee  
15 Retirement Income Security Act of 1974 ("ERISA").

16 **RESERVATION OF RIGHTS**

17 Defendant presently has insufficient knowledge of information on which to form a belief  
18 as to whether it may have additional as yet unstated affirmative defenses available. Defendant  
19 reserves herein the right to assert additional defenses in the event that discovery indicates that  
20 they would be appropriate.

21 ///

22 ///

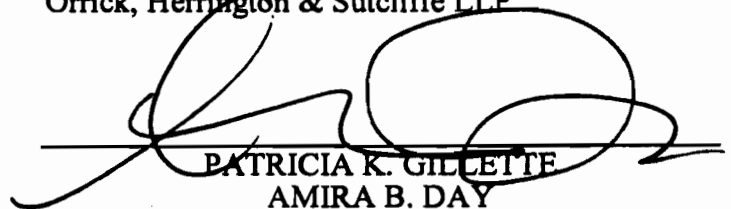
23 ///

WHEREFORE Defendants pray:

1. That Plaintiff's Complaint be dismissed with prejudice in its entirety and Plaintiff take nothing thereby;
2. That Judgment be entered in favor of Defendant on all claims and against Plaintiff;
3. That Defendant be awarded attorneys' fees under applicable law and its costs of suit; and
4. That Defendant be granted such other and further relief as this Court may deem appropriate.

Dated: December 21, 2009

PATRICIA K. GILLETTE  
AMIRA B. DAY  
Orrick, Herrington & Sutcliffe LLP



PATRICIA K. GILLETTE  
AMIRA B. DAY  
Attorneys for Defendant  
BANK OF AMERICA, NATIONAL  
ASSOCIATION

**PROOF OF SERVICE BY MAIL**

I am more than eighteen years old and not a party to this action. My place of employment is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On December 21, 2009, I served the foregoing document(s):

**➤ ANSWER TO FIRST AMENDED COMPLAINT FOR DAMAGES, INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL**

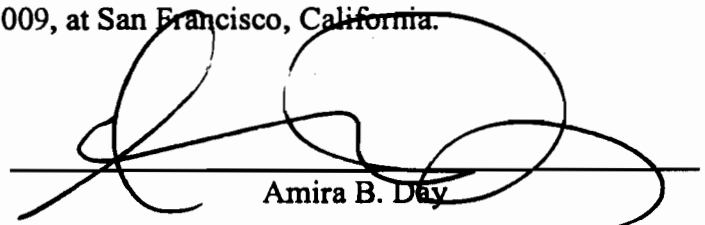
on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

**David J. Becht, Esq.  
Michael Sachs, Esq.  
Mythily Sivarajah, Esq.  
Adams| Nye| Trapani| Becht LLP  
222 Kearny Street, Seventh Floor  
San Francisco, CA 94108-4521**

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this corporation's business address indicated above. I am readily familiar with this business location's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the corporation's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2009, at San Francisco, California.

  
Amira B. Day